MOTION FILED
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No. 97-930

In The

Supreme Court of the United States

October Term, 1997

VICTORIA BUCKLEY,
Colorado Secretary of State,

Petitioner,

vs.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; and BILL ORR, individually and as guardian of WILLIAM DAVID ORR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF THE INITIATIVE & REFERENDUM INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

STEPHEN J. SAFRANEK
Associate Professor of Law
University of Detroit Mercy
651 E. Jefferson
Detroit, Michigan 48226
(313) 596-0268
Legal Counsel of Record
for Amicus Curiae
The Initiative & Referendum Institute

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

The Initiative & Referendum Institute seeks leave of this Honorable Court to file an Amicus Brief in the above-referenced matter. The Initiative & Referendum Institute is dedicated to educating the public about and helping the citizenry protect its right to the initiative and referenda process throughout the country. Consent of the parties to this action was sought by Amicus Curiae. Consent was granted by the State of Colorado and was withheld collectively by the respondents.

Respectfully submitted,

STEPHEN J. SAFRANEK
Associate Professor of Law
University of Detroit Mercy
651 E. Jefferson
Detroit, Michigan 48226
(313) 596-0268
Legal Counsel of Record
for Amicus Curiae
The Initiative & Referendum Institute

QUESTION PRESENTED FOR REVIEW

Whether the State of Colorado may constitutionally regulate the process of circulating initiative petitions by requiring that: (1) petition circulators who verify the signatures of petition signers must be registered electors; (2) petition circulators must wear identification badges; and (3) proponents of an initiative must file reports disclosing the amounts paid to circulators and the identity of petition circulators.

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BRIEF OF THE INITIATIVE & REFERENDUM INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

INTEREST OF AMICUS CURIAE

The Initiative & Referendum Institute is a national non-profit organization dedicated to educating and helping the citizenry protect the right to enact laws.[1] The Colorado statutes under review are similar to other states' statutes. If these statutes are constitutional, similar statutes will be constitutional and will be enacted by other states.

Every word written by this Court on the power of the legislature will be parsed by the legislatures in the initiative states to see what measures they may enact to eviscerate the initiative process. State legislatures are institutions of permanent government. Consequently, they exercise power regularly to limit the initiative power of the citizenry which exercises its power sporadically. Legislative control of the initiative is the ability to control whether or not the initiative is used.

The power of the citizenry to organize state government through the initiative should not be circumscribed by that very body whose actions necessitate an initiative or referendum. It is the power of the citizens, acting as the supreme branch of state government, that the Initiative & Referendum Institute seeks to protect herein.

SUMMARY OF ARGUMENT

The States are not obligated to provide their citizens with the powers of the initiative and referendum, but once a state allows its citizens these powers, it must do so in a manner that does not violate the United States Constitution.[2] In addition,

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in part or in whole, this Amicus Curiae Brief. Furthermore, no other entity or person, aside from Amicus Curiae, made any monetary contribution for the preparation or submission of this brief to this Honorable Court.

[2] *See Meyer v. Grant*, 486 U.S. 414, 420 (1986).

this Court has never determined the respective role of the separate branches of governmental power within a state, including the supreme state power held by the citizenry in the initiative states.

This Brief provides a review of provisions that have been enacted in initiative and referenda states. It will show that the statutes struck down by the Tenth Circuit Court of Appeals in the case before this Court, and similar statutes in effect in other states, unnecessarily inhibit the people's right to utilize their initiative powers, thereby restricting the independent legislative power reserved to the citizenry in the states.

State legislatures have enacted and continue to enact limitations on the initiative. These limitations appear under the guise of protecting the lawmaking process of the citizenry. However, these self-serving laws serve to protect the legislative monopoly. This true purpose is evident because the restrictions imposed on the people's powers of the initiative are not similarly imposed on legislators or lobbyists seeking to bring about changes in state laws.

The initiative and referendum provide a means by which the people can ensure that they can enact law irrespective of the legislature. The statutes involved in this case and others similarly enacted in other initiative states are an attempt by legislators to circumscribe the people's initiative power. The people's supreme right to enact laws and constitutions in initiative states should not be subject to legislative amputation.

ARGUMENT

CITIZENS ARE AT LEAST A CO-EQUAL BRANCH OF THE LEGISLATURE IN INITIATIVE STATES AND THEIR POWER TO INITIATE IS PROTECTED BY THE FIRST AMENDMENT.

I. INTRODUCTION

Many states recognize the citizenry's right to adopt laws or to amend the state constitution. The organization of political power in these states has no analogue in federal government. The citizenry in such states constitutes a separate branch of government which may act as a legislative body when the

legislature fails to act or acts incorrectly. This extraordinary action by the citizenry has one simple and sure protection from abuse by anyone – one person, one vote.[3] A variety of means are used to enact extraordinary legislation.

The initiative and referendum may be used by the citizens in twenty-four states to directly legislate by enacting laws and/or constitutional amendments or to reject laws proposed by the state legislature.[4] There are four types of direct legislation: 1) **direct initiative** whereby constitutional amendments or statutes proposed by the people are directly placed on the election ballot and then submitted to the people for their approval or rejection (the state legislature has no role

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[3] *Reynolds v. Sims*, 377 U.S. 533 (1964).

[4] Florida, Illinois, and Mississippi use the initiative to propose constitutional amendments only. *See* Fla. Const. art. XI, §3; Ill. Const. art. XIV, §3; and Miss. Const. art. 15, §273(3). Illinois' initiative power is very limited. The people may exercise the initiative power to propose constitutional amendments only to "structural and procedural subjects contained in Article IV" which is Illinois' legislative article. In the Constitutional Commentary following Article XIV, section 3, it states that Section 3 "recognizes that the General Assembly is unlikely to propose any changes in its basic structure, but that some changes may appear to be necessary." (Ill. Const. of 1970, Art. XIV, §3, at 858 (West 1993)). Alaska, Idaho, Maine, Utah, Washington, and Wyoming allow the initiative to be used to propose only statutes. *See* Alaska Const. art. XI, §1; Idaho Const. art. III, §1; Me. Const. art. IV, Pt. 1, §1, and art. IV, Pt. 3, §§17-20; Utah Const. art. VI, §1; Wash. Const. art. II, §1; and Wyo. Const. art. III, §52. The remaining fifteen states allow the people to use the initiative to propose both constitutional amendments and statutes. *See* Ariz. Const. art. IV, Pt. 1, §1; Ark. Const. amend. 7; Cal. Const. art. II, §§8-10; Colo. Const. art. V, §1; Mass. Const. am. art. 48; Mich. Const. art. II, §9, and art. XII, §2; Mo. Const. art. III, §49; Mont. Const. art. III, §4 and §5, and art. XIV, §2 and §9; Neb. Const. art. III, §1; Nev. Const. art. XIX; N.D. Const. art. III; Ohio Const. art. II, §1; Okla. Const. art. V, §1; Or. Const. art. IV, §1; and S.D. Const. art. III, §1 and art. XXIII, §1.

The District of Columbia also provides some form of the initiative and referendum. Kentucky, Maryland, and New Mexico provide their citizens with the power of popular referendum, only. They are not considered in this brief.

in this process);[5] 2) **indirect initiative** whereby statutes proposed by the people through a petition must first be submitted to the state legislature during a regular legislative session;[6] 3) **popular referendum** whereby the people have the power to refer, through a petition, specific legislation that was enacted by their legislature for the people to either accept or reject;[7] and 4) **legislative referendum** whereby the legislature submits propositions to the people for their approval or rejection.[8]

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[5] *See* DAVID B. MAGLEBY, DIRECT LEGISLATION VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 35 (1984).

[6] *Id.* at 35-36. If the legislature fails to approve the statute or it amends the proposed statute in a manner that is not acceptable to the proponents of the proposed statute, the proponents may proceed to collect the signatures necessary to have the original proposed statute submitted to the voters. Some states allow their legislature to submit an alternative proposal on the same subject as the initiated proposal for the people to choose between. *Id.*

[7] *Id.* at 36. Those seeking to refer a law must submit a proper petition within a specified time after the legislative session has adjourned. *Id.*

[8] This is either constitutionally required, as in proposing constitutional amendments, or because the legislature voluntarily chooses to submit legislation to the people. Delaware is the only state that does not require constitutional amendments proposed by the legislature to be submitted to the people for their approval or rejection. *Id.* at 36.

Of the eighteen (18) states that provide the initiative to propose constitutional amendments – Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota – every state, except Massachusetts and Mississippi, uses the **direct initiative**. Massachusetts and Mississippi require initiatives proposing constitutional amendments to first be submitted to the legislature before being placed on the ballot. *See* Mass. Const. am. art. 48, Pt. 4, §§1-5; Miss. Const. art. 15, §273(6).

Of the twenty-one states that allow the initiative to propose statutes, twelve use only a direct method, *see* Alaska Const. art. XI, §§1-6; Ariz. Const. art. IV, Pt. 1, §1; Ark. Const. amend. 7; Cal. Const. art. II, §8 and §9; Colo. Const. art. V, §1; Idaho Code Ann. §34-1809; Mo. Const. art. III,

Many initiative states provide that these reserved powers in the people are "self-executing." In other initiative states, the legislature is entrusted with creating procedures by which the people may exercise the initiative and/or referendum.[9] Citizen concern about the legislature's efforts to limit initiative rights has ensured that even in some of these latter states, the legislature is specifically instructed to enact laws designed to only **facilitate**, not hinder, the initiative and referendum processes.[10]

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§§49-51; Mont. Code Ann. §§13- 27-101 to 13-27-504; Neb. Const. art. III, §2 and §3; N.D. Const. art. III, §§4-9; Okla. Const. art. V, §§2-3; Or. Const. art. IV, §2; S.D. Const. art. III, §1 and S.D. Codified Laws, §§2-1-1 to 2-1-14; two allow initiatives to be proposed directly or indirectly, *see* Utah Code Ann. §20A-7-102(1)(a) and §20A-7-201; and Wash. Const. art. II, §1; two states provide an indirect initiative for statutes but a direct initiative for constitutional amendments, *see* Mich. Const. art. II, §9, and Mich. Const. art. XII, §2; and Nev. Const. XIX, §2(3) and §2(4); and three allow statutes to be proposed only indirectly, *see* Me. Const. art. IV, Pt. 3, §18; Mass. Const. am. art. 48, Pt. 5, §§1-2 (Massachusetts also uses the indirect method to propose constitutional amendments. *See* Mass. Const. am. art. 48, Init., Pt. 4, §§1-5); Ohio Const. art. II, §1b (Ohio allows direct initiative to propose constitutional amendments. *See* Ohio Const. art. II, §1a).

Alaska and Wyoming allow the initiative to propose only statutes. A variation of the indirect method is used. *See* Wyo. Const. art. III, §52(d) and Alaska St. Ann. §15.45.190.

[9] *See* Ariz. Const. art. 4, Pt. 1, §1(15); Ark. Const. amend. 7; Cal. Const. art. II, §10; Colo. Const. art. V, §1(10); Idaho Const. art. III, §1; Mass. Const. Am. 48, Gen., Pt. 7; Mich. Const. art. 2, §9; Mont. Code Ann. §13-27-101; Neb. Const. art. III, §4; Nev. Const. art. XIX, §5; N.D. Const. art. III, §1; Ohio Const. art. II, §1g; Okla. Const. art. V, §3; S.D. Const. art. III, §1; Wash. Const. art. II, §1(d).

[10] *See* Ark. Const. amend. 7 ("No legislation shall be enacted to restrict, hamper, or impair the exercise of the rights herein reserved to the people"); Mass. Const. Am. 48, Gen., Pt. 7; Miss. Const. art. 15, §273(13); Neb. Const. art. III, §4; Nev. Const. art. XIX, §5; N.D. Const. art. III, §1; Ohio Const. art. II, §1g; and Wash. Const. art. II, §1(d). *See also* Ark. Const. amend. 7, "Unwarranted Restrictions Prohibited." Under this section of Amendment 7 to the Arkansas Constitution, the state legislature is prohibited from passing any law that would preclude persons from

Despite the fact that the citizenry adopted the initiative and referendum to ensure citizen government, most of the states where the citizens provided that they retain initiative rights have seen the legislature enact legislation that restricts rather than facilitates the use of these powers by the people.[11] The legislatures' regulation of the initiative and referendum often violate the citizenry's First Amendment rights as articulated by this Court in *Meyer v. Grant*, 486 U.S. 414 (1986).[12] Not a **single** example of truly facilitating legislation has ever been enacted by any state legislature. Furthermore, the restrictions imposed on the citizenry are typically not imposed on other individuals seeking to use a state's electoral processes to invoke changes in state government, whether it be through lobbying, legislating, or running for political office.

Although the states have a compelling interest in ensuring that all elections, including those on the initiative and referendum, are conducted in a non-fraudulent manner, lobbyists who seek to have the legislature enact new laws or propose amendments to the state constitution, for example, typically have no voter registration or residency requirements imposed on them. The purported purpose behind legislatively imposed limitations on the citizenry in the initiative and/or referendum process should be viewed skeptically in the

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giving or receiving compensation for circulating petitions, or to pass any law that would prohibit the circulation of petitions or in any way interfere with the people's freedom to secure petitions.

[11] *See Meyer v. Grant*, 486 U.S. 414, 422-23 (1988); *Term Limits Leadership Council, Inc. v. Clark*, 984 F.Supp. 470 (S.D.Miss. 1997); *American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092 (10th Cir. 1997); *Bernbeck v. Moore*, 936 F.Supp. 1543, 1568 (D.Neb. 1996), *aff'd* 126 F.3d 1114 (8th Cir. 1997); and *Limit v. Maleng*, 874 F.Supp. 1138 (W.D.Wash. 1994).

[12] *See Meyer v. Grant*, 486 U.S. 414, 422-23 (1986); *American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d 1092, 1100 (10th Cir. 1997); *Bernbeck v. Moore*, 936 F.Supp. 1543, 1561 (D.Neb. 1996), *aff'd* 126 F.3d 1114 (8th Cir. 1997).

absence of evidence of unique voter fraud during these processes. Moreover, the citizens, as the supreme branch of legislative power in the state, should not have their separate and supreme power limited by a distinct and inferior branch of state government.[13] Indeed, given the fact that any initiative proposed for adoption by the people is subject to a vote by them, any limitation on the process by which initiatives are placed on the ballot should be viewed skeptically.

II. THE HISTORY OF THE INITIATIVE AND REFERENDUM PROCESS IN THE UNITED STATES

Colorado, as well as twenty-three other states and the District of Columbia have some form of statewide direct democracy.[14] "Initiatives generally allow the public to bypass the legislature and reserve direct lawmaking power in the voters of the state."[15] The initiative is "the means by which voters can correct legislative sins of omission and the popular referendum as the means of correcting legislative sins of commission."[16]

Direct democracy has a long history. It existed in this country as far back as the 1600's when people in New England, through their town meetings, placed ordinances and

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[13] *See Morrison v. Olson*, 487 U.S. 654 (1988). *See also United States v. Johnson*, 383 U.S. 169 (1966); and *United States v. Brewster*, 408 U.S. 501 (1972) (evidence of a legislative act of a member may not be introduced by the Government in a criminal prosecution).

[14] States that currently have some form of statewide direct democracy are: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wyoming, and the District of Columbia.

[15] *See* P.K. Jameson and Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 418 (1995).

[16] *See* MAGLEBY, *supra* note 5, at 35.

other issues on the agenda for discussion and then a vote.[17] The first state to hold a statewide referendum for its citizens to ratify its constitution was Massachusetts in 1778.[18] New Hampshire followed in 1792. All but three of the states that entered the Union after 1830 required the voters to approve their proposed state constitutions. Congress itself required that voters approve state constitutions proposed after 1857.[19] At this time, citizens began considering expansion of the use of the referendum and the initiative.[20] In the late 1800's, serious reform-minded individuals began pushing for them.[21]

In 1897, Nebraska became the first state to allow cities to provide the initiative and referendum in their charters.[22] One

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[17] *See* DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 3-4 (1989).

[18] *Id.* at 4. Voters rejected the proposed constitution forcing the Massachusetts legislature to rewrite it. All subsequent state constitutional amendments in Massachusetts have been submitted to the voters for their approval.

[19] *Id.* at 5.

[20] *Id.*

[21] These individuals were commonly associated with the Progressives. *Id.* The Populists initiated the movement in the United States pushing the states to provide the Initiative and Referendum in constitutions. *See* Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the People's Powers of Initiative and Referendum*, 32 GONZ. L. REV. 247, 253 (1996-1997). The labor movement joined forces with Populists of the Midwest at the Populist Party's 1896 party convention supporting the initiative and referendum movement. *See* SCHMIDT, *supra* note 17, at 7. The Populist Party thought that the initiative and referendum allowed the people to control their government. *Id.* at 8. This Court has ruled that issues arising under the Guarantee Clause of the United States Constitution are nonjusticiable political questions. *See Luther v. Borden*, 48 U.S. 1 (1849). In *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1911), this Court applied the same reasoning to questions involving the initiative and referendum.

[22] SCHMIDT, *supra* note 17, at 7.

year later, South Dakota became the first state to adopt the statewide initiative and referendum.[23]

Oregon followed in 1902 when Oregon voters approved initiative and referendum by a margin of 11 to 1.[24] Other states soon followed.[25] Between 1898 and 1918, with the help of the Progressives who picked up where the Populists left off, nineteen states had adopted some form of the initiative.[26]

The initiative and referendum is based on a theory of trusting the individual and distrusting politicians and political parties, as well as legislatures.[27] The Progressives worked steadily to bring down the political machines and bosses controlling American politics.[28] These early reformers, like many of today's proponents of the initiative and referendum, wanted to ensure that elected officials remained accountable to the electorate.[29] Indeed, the theory behind the initiative and referendum is that in America, it is the people who govern.[30]

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[23] *Id.*

[24] *Id.* at 8.

[25] In 1906, Montana's voters approved an initiative and referendum amendment proposed by the state legislature. Oklahoma became the first state to provide for the initiative and referendum in its original constitution in 1907. Maine and Michigan passed initiative and referendum amendments in 1908. *See id.* at 8.

[26] Fourteen states provide for constitutional amendments proposed through the initiative. *See* MAGLEBY, *supra* note 5, 38-39.

[27] *Id.* at 20.

[28] *Id.* at 21. The Progressives sought reforms eliminating the influence of special interests, businesses, and political parties on government. *Id.* at 22.

[29] *Id.* at 20. The Progressives are credited with the initiative and referendum, women's right to vote, the direct election of Senators, and direct primaries. *Id.* at 23.

[30] *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819) (Marshall, C.J.) ("The government of the Union . . . is, emphatically and truly, a government of the people.").

III. THE LEGISLATURE HAS UNCONSTITUTIONALLY IMPOSED RESTRICTIONS ON THE PEOPLE'S RIGHT TO THE INITIATIVE AND REFERENDUM

A variety of legislative enactments in various states demonstrates how the legislatures have reacted to the use of the initiative process. Their response appears based on self-interest rather than an interest in protecting a system of government where the citizens are a supreme and independent branch of government. A review of the various legislatures' responses reveals that control of a superior and distinct branch of government, the people, by legislative action is not about fraud but about raw politica' power.

A. States have banned paying petition circulators on a 'per signature' basis.

Several states have prohibited sponsors of initiative petitions from paying or compensating persons who circulate or obtain signatures on petitions according to the number of signatures collected or petitions circulated. These laws were enacted despite the absence of any showing that the initiative process needed correction.

i. Florida

In Florida, the citizenry may propose constitutional amendments in a manner controlled by the legislature.[31] In both 1990 and 1991, when the statewide campaigns for term limits on the legislature were moving forward,[32] the legislature introduced bills that would have changed the process for collecting signatures for initiative petitions.

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[31] *See* Fla. Const. art. XI, §3. Legislative enactments control the procedures for amendments. *See* Fla. St. Ann. §99.097, §100.371, and §101.161.

[32] *See* Fla. Const. art. VI, §4.

First, in 1990, Senate Bill 870 required that each signature on a petition be witnessed and the sponsor certify that no per signature fee was paid. Second, the 1991 bill required initiative sponsors to certify that they had not paid a per signature fee for the collection of signatures. These two attempts by the legislature to make the collection of initiative signatures more difficult were vetoed.[33]

Both Governor Martinez and Chiles concluded that this proposed legislation would "'so stringently limit access to certification of a citizen initiative that it must be viewed as an effort to quash or severely limit the ability of the people to revise their constitution, in contradiction to the spirit expressed by this reservation of power.' "[34] Interestingly, these bills were introduced while term limit petitions were circulating. In 1992, term limits were enacted on Florida's state legislature.

Currently, Florida is attempting to require sponsors of initiatives who intend to use paid petition circulators to file an affidavit with Florida's election division.[35] This is being done despite this Court's statement that it was

> not prepared to assume that a professional circulator – whose qualifications for similar future assignments may well depend on a reputation for competence and integrity – is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

Meyer, 486 U.S. at 426.[36] The Florida legislature is attempting to end-run *Meyer*.

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[33] *See* Jameson and Hosack, *supra* note 15, at 450-51 (1995).

[34] *See id.* (quoting Governor Martinez, Veto of Fla. SB 870 (1990)).

[35] Those sponsors who use paid circulators must provide the names and addresses for each person who will be paid to circulate and include their name on each petition they circulate. *See* Fla. St. Ann. §100.371 (West 1998 Cum. Pocket Part).

[36] *See Term Limits Leadership Council, Inc. v. Clark*, 984 F.Supp. 470, 475 (S.D.Miss. 1997).

ii. Mississippi

Florida is not alone. The Mississippi legislature recently overrode the Governor's veto to enact legislation making it unlawful for persons who pay other persons to circulate initiative petitions or who collect signatures on a petition to base that pay on the number of signatures collected or petitions circulated.[37] This law requires the State to refuse to accept any initiative petitions, even if only **one** signature on the entire petition was obtained in violation of the "per signature" ban.[38] This legislation coincided with a term limits initiative for the state legislature. Mississippi's Constitution directs the legislature not to restrict or impair the people's reserved power to propose constitutional amendments.[39]

iii. Washington

Like Mississippi, the Washington legislature, in 1993, one year after term limits were approved by the voters via the initiative, enacted a statute making it a "gross misdemeanor" to pay or compensate circulators according to the number of signatures collected.[40] The legislature asserted that this form

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[37] *See* Miss. Code Ann. §23-17-57(3).

[38] *See* Miss. Code Ann. §23-17-23(c). Under Miss. Code Ann. §23-17-61, any violation of §§23-17-49 through 23-17-59 which includes paying someone on a per signature basis, could be punished by a prison term in the county jail not to exceed one (1) year and/or a fine not to exceed one thousand ($1,000) dollars.

[39] In *Term Limits Leadership Council, Inc. v. Clark*, 984 F.Supp. 470 (S.D.Miss. 1997), Mississippi asserted that it had a compelling interest in protecting the integrity of its initiative process and that paying circulators on a "per signature" basis encouraged fraud because it provided an incentive for the circulators to collect as many signatures as possible, no matter how they collected them. *Id.* at 474. The court found that the State had "not even remotely approached demonstrating a compelling state interest for the statutes." *Id.* at 473.

[40] *See* Rev. Code of Washington, §29.79.500 and §29.79.490(2). Interestingly, in the same piece of legislation wherein the legislature banned paying petition circulators on a "per signature" basis, it also amended the provisions regarding the contents of reports required to be filed by candidates and political committees in Washington. Section 42.17.090 of the Revised Code of Washington was amended to add subsection (g) to section 1. Under subsection (g), reports filed under Section 42.17.080 must disclose:

> The name and address of each person to whom any expenditure was made directly or indirectly to compensate the person for soliciting or procuring signatures on an initiative or referendum petition, the amount of such compensation to each such person, and the total of the expenditures made for this purpose. . . .

See Rev. Code of Wash. §42.17.090(1)(g).

of compensation "encourages the introduction of fraud in the signature gathering process . . . Such payments also threaten the integrity of the initiative and referendum process by providing an incentive for misrepresenting the nature or effect of a ballot measure in securing petition signatures for the measure."[41]

This restriction was struck down because the State failed to produce proof of fraud or an actual threat to the "citizens' confidence in government" resulting from circulators being compensated based on the number of signatures they procured.[42]

iv. North Dakota, Maine, and Wyoming

Three other states have enacted measures similar to those previously discussed. Wyoming and Maine enacted legislation prohibiting the payment of initiative petition circulators based on the number of signatures they collect.[43] Maine's legislature passed its statute in 1994, one year after term limits were passed by the voters through the initiative. Wyoming's legislature imposed its restriction on the people in 1996, at a time

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[41] *See* Rev. Code of Washington, §29.79.500 and §29.79.490(2).

[42] *Limit v. Maleng*, 874 F.Supp. 1138 (W.D. Wash. 1994).

[43] *See* Wyo. St. §22-24-125(a); and 21-A, Me. Rev. St. Ann. §904-A.

when there was an initiative campaign underway that would inform voters on the ballot whether candidates for the state and federal legislatures supported a term limits amendment to the United States Constitution.

North Dakota enacted legislation in 1988 that also precluded paying initiative and referendum petition circulators based on the number of signatures collected.[44] This was a legislative response to the criminal convictions of five paid circulators for petition fraud in a 1986 initiative involving the lottery.[45] Thus, this one time experience with petition fraud, fraud that was detected and powerfully prosecuted, was used to permanently deprive the people of an effective method for exercising their constitutional right to the initiative and referendum.

v. Summation

With the exception of North Dakota, every state legislature that restricted initiative sponsors from paying circulators on a "per signature" basis imposed the restriction shortly after the people, exercising their constitutional right to the initiative, passed term limits on state officials, including legislators. This historical evidence suggests that this Court should be skeptical of any limitation on the initiative process where the purported interest is protecting the integrity of the initiative process.

B. "Notice" requirement of circulators who are being paid.

Although not prohibiting the payment of petition circulators, some states have sought to limit the initiative by requiring some form of "notice" or disclosure either on the initiative petition itself or in a statement to be filed with an

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[44] *See* N.D.C.C. §16.01-12(11).

[45] *See* California Commission on Campaign Financing, Democracy By Initiative – Shaping California's Fourth Branch of Government 143 (1992).

official informing potential signers and the appropriate officials whether and how much such circulators are or will be paid. These states include Idaho,[46] Colorado,[47] Arizona,[48] Ohio,[49] Oregon,[50] and California.[51]

i. Oregon

Oregon's statutes provide that the chief petitioners of a measure must include a statement with their prospective petition indicating whether persons will be paid money or "other valuable consideration" for collecting signatures on the petition.[52] In 1992, the same year that term limits were enacted on legislators via the initiative, the legislature proposed an amendment to that section that would also require that each sheet of the petition indicate whether circulators were paid. The "notice" would state "Some Circulators For This Petition Are Being Paid."[53] This bill was passed over the Governor's veto.[54]

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[46] *See* Idaho Code Ann. §34-1814A.

[47] *See* Colo. Rev. St. Ann. §1-40-112.

[48] *See* Ariz. Rev. St. Ann. §19-101(B)(C) and §19-102(B)(C).

[49] Ohio Rev.Code. Ann. §3519.05 provides that before any signatures may be placed on a petition, the circulator must state what he or she has received or expects to receive in consideration of their services and from whom. The address of the person giving the compensation must also be included. However, the sample forms the State of Ohio provides for nominating petitions for candidates seeking to be placed on the ballot for a primary or general election do not make provisions for such information regarding whether or not the circulator of a nominating petition was receiving compensation and from whom. *See* Ohio Rev. Code Ann. §3513.07 and §3513.261.

[50] *See* Oregon Rev. St., §250.045(4) and §250.045(5)(b)(B)(C).

[51] *See* Ann. Calif. Code, Elec., §101.

[52] *See* Oregon Rev. St. §250.045(4).

[53] *See* Oregon Rev. St. §250.045(5)(b)(B).

[54] This House Bill, 2465, also known as the "Scarlet Letter Bill," was vetoed by Governor Barbara Roberts who noted that sponsors of initiative

ii. Arizona

Arizona requires each petition sheet to have a space for indicating whether a circulator is a paid circulator or is a volunteer. This provision was added by the legislature in 1991 just before term limits were adopted by the people through the initiative process in 1992.[55] Arizona invalidates those signatures obtained by a circulator who does not indicate whether he or she is paid or is a volunteer.[56]

iii. California

In the same year that legislative term limits were approved by the voters via the initiative in California, the legislature added its "notice" provision to California's Elections Code in 1990 as Section 41.5.[57] This section provided that

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and referendum petitions were already required to inform the State in their explanatory page of the petition whether circulators were being paid. Governor Roberts stated, "HB 2465 is an inappropriate and unnecessary expansion of current law and implies a difference in the commitment of petition circulators based on whether they are volunteers or paid supporters." *See* Oregon Legislation, 1SS 1 (1992), ch. 1, HB 2465 (Westlaw). Candidates filing nominating petitions must include a statement with their petition whether one or more circulators will be paid. *See* O.R.S. §249.061(3); §249.078(2); and §249.740(3). However, these nominating petitions do not require that each sheet of the petition indicate whether the circulators are paid. This is unlike the petitions for initiatives which are required to include a statement on each sheet whether a circulator is being paid.

[55] *See* AZ Legis. 3SS 1 (1991) (S.B. 1001) (Westlaw). Section 19-102 was amended in 1991 to require that circulators indicate whether they were paid or were volunteers. However, it did not include the provision stating that each petition sheet would have printed on them the spaces for "___ paid circulator" "___ volunteer." Therefore, in 1995, Section 19-102 was amended inserting subsection B and moving former subsection B to become the new subsection C.

[56] *See* Ariz. Rev. St. Ann. §19-101(D) and §19-102(D).

[57] *See* CA Legis. 1026 (1990) (Westlaw).

> **Notwithstanding any other provision of law, any state or local initiative petition required to be signed by voters shall contain in 12-point type, prior to that portion of the petition for voters' signatures, printed names, and residence addresses, the following language: NOTICE TO THE PUBLIC THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK.** (emphasis added).

Only initiative petitions require such a notice.

iv. Idaho

The Idaho legislature revised in 1997 its state's statutory provisions governing the initiative and referendum.[58] The legislature imposed new restrictions making it more difficult for the citizens to successfully qualify an initiative or referendum petition for the ballot.

Included in these revisions was a specific statement that "Any person who circulates any petition for an initiative or referendum shall be a qualified elector of the state of Idaho."[59] Section 34-1807 further states that "Any petition upon which signatures are obtained by a person not a qualified elector of the state of Idaho shall be void." Thus, like Mississippi, Idaho not only punishes the circulator, but it also punishes the signers of these petitions, even when the signatures are valid.[60]

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[58] *See* Idaho Code Ann. §34-1801 through §34-1823 (Michie 1997 Cum. Pocket Part).

[59] *See* Idaho Code Ann. §34-1807 (1997 Cum. Pocket Part).

[60] *Cf.* Washington. Violations of Rev. Code of Wash. §29.79.490 do not invalidate the signatures on the petitions because despite the misconduct of the proponent, the signers of the petition were still exercising a constitutional right. *See* Even, *supra* note 21, at 263, nn. 121, 123.

Idaho also now requires that initiative and referendum petitions circulated by paid circulators have printed in bold red type the statement:

> THIS INITIATIVE (OR REFERENDUM as the case may be) PETITION IS BEING CIRCULATED BY A PAID SIGNATURE GATHERER. THE SIGNATURE GATHERER IS EMPLOYED BY OR HAS CONTRACTED WITH. . . . , THE MAIN OFFICE OR HEADQUARTERS OF WHICH IS LOCATED AT (city and state).[61]

If the person is a volunteer, however, the petition must have printed in bold red type: "THIS INITIATIVE (OR REFERENDUM as the case may be) PETITION IS BEING CIRCULATED BY AN UNPAID VOLUNTEER."[62] No "Notice" requirements must be placed on legislative nominating petitions indicating to signers of such petitions that the circulator is being paid, is a volunteer, or even is an employee of a state legislator.[63]

v. Colorado

In 1993, the Colorado legislature amended its entire statutory article governing initiatives and referendums. It added a subsection that not only required "notice" whether a petition circulator was paid, but also required the circulator to wear a badge while circulating.[64] This badge was to have

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[61] *See* Idaho Code Ann. §34-1814A(1) (1997 Cum. Pocket Part).

[62] *See* Idaho Code Ann. §34-1814A(2) (1997 Cum. Pocket Part). In addition, a circulator of an initiative or referendum petition, regardless of whether they are paid or not, must now show each signer the short title and general title of the petition, as defined in §34-1809 of the Idaho Code, and allow the signer the opportunity to read them before signing the petition. Otherwise, it is unlawful, and any signature collected without complying with this section is void. *See* Idaho Code Ann. §34-1815.

[63] The "Notice" requirement that was added to the initiative and referendum petitions in 1997 specifically refers to initiative and referendum petitions. *See* Idaho Code Ann. §34-1814A.

[64] *See* Colorado Rev. St. §1-40-112(2).

printed on it in bold-faced type "VOLUNTEER CIRCULATOR" or "PAID CIRCULATOR." Moreover, if the circulator was paid, the name and telephone number of the person who hired them was also to be printed on the badge.[65] This "badge" was purportedly necessary to help "prevent fraud by enabling the public to identify individuals who make false or fraudulent statements while circulating."[66]

The Tenth Circuit Court of Appeals upheld the trial court's ruling striking down this requirement as unconstitutional. While agreeing that the state has a "compelling interest" in maintaining the integrity of its initiative process,[67] the Tenth Circuit held that this provision was not narrowly tailored to serve the state's interest.[68] This case is here for review by this Court.

C. Residency and voter registration requirements for petition circulators.

In addition to the above restrictions, most of the states that provide for the initiative and referendum now require that these circulators be residents and registered voters of the state

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[65] *See* Colorado Rev. St. §1-40-112(2)(a)(b).

[66] *See American Constitutional Law Foundation, Inc. v. Meyer,* 120 F.3d 1092, 1102 (10th Cir. 1997).

[67] *See id.*, at 1102.

[68] The Tenth Circuit stated,

> Conditioning circulation upon wearing an identification badge is a broad intrusion, discouraging truthful, accurate speech by those unwilling to wear a badge, and applying regardless of the character or strength of an individual's interest in anonymity. Additionally, the badges are but one part of the state's comprehensive scheme to combat circulation fraud.

Id. at 1103.

in which they circulate.[69] Thus, fewer people are able to engage in "core political speech."[70]

A residency/voter registration requirement for petition circulators diminishes the number of persons available to promote a political message through the initiative petition. This, in turn, reduces "the size of the audience they can reach."[71] Certainly, such restrictions make it less likely that sponsors of initiatives will collect signatures necessary to place the initiative on the ballot.[72]

Yet, some of the states that now require circulators to be residents/registered voters did so because the legislatures claimed they were dealing with problems associated with paid circulators. However, like the restrictions discussed above, the residency and/or voter registration requirement(s) are a reaction to limits on the legislature.

i. Nebraska

Nebraska's unicameral limited initiative petition circulators to Nebraskans. The legislative debates surrounding the voter registration requirements acknowledged that such a requirement was enacted to address problems associated with

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[69] *See* Miss. Code Ann. §23-17-17(2); Ill. Comp. St. 10 ILCS 5/28-3; Alaska St. Ann. §15.45.110; Idaho Code Ann. §34-1807; Me. Rev. St. Ann. 21-A, §903-A and Me. Const. art. IV, Pt. 3, §20; Utah Code Ann. §§20A-7-203, 205, and 206 (eff. in 1994 and 1995. Legislative term limits were enacted via the initiative in 1994 in Utah); Wyo. St. Ann. §22-24-112 (*see also* Wyo. St. Ann. §22-24-107); Colo. Rev. St. Ann. §1-40-111(2); Mich. Comp. Laws Ann. §§168.544C(2), 168.482(5), and 168.544C(10); AZ. Rev. St. §19-114(A); Vernon's Ann. MO. St. §116.080; Nev. Const. art. XIX, §1(2), §2(2), §3, and Nev. Rev. St. §295.055(2); Okla. St. Ann. ch. 34, §3.1; S.D. Codified Laws Ann. §2-1-10; and Ann. Calif. Code, Elec. §102 and §9021.

[70] The "circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' " *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988).

[71] *Meyer v. Grant*, 486 U.S. at 423.

[72] *Meyer v. Grant*, 486 U.S. at 423.

paid circulators.[73] The legislature sought to do indirectly that which this Court ruled a state could not do, prohibit the use of paid professional circulators.[74]

ii. Colorado

Although Colorado's Constitution was amended to require that circulators of petitions be "registered electors,"[75] the Tenth Circuit Court ruled that this law "unconstitutionally impinged on free expression."[76] Without deciding whether a state's interest in preserving the integrity of its initiative process required that all circulators be residents of the state, the court found that Colorado's voter registration requirement

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[73] *See Bernbeck v. Moore*, 936 F.Supp. 1543, 1548 (D.Neb. 1996), *aff'd* 126 F.3d 1114 (8th Cir. 1997).

[74] The court in *Bernbeck* noted that based on undisputed evidence, when the petition sponsors and organizers tried to follow the statutory restrictions imposed by the Nebraska state legislature, "the number of individuals they could hire to solicit signatures was **grossly insufficient to the task**, and this was true despite efforts to obtain "qualified" circulators . . . " *Bernbeck v. Moore*, 936 F.Supp. at 1561 (emphasis added). The court concluded that "As a factual matter, there is no doubt the challenged restrictions dramatically reduce the number of circulators who can be hired or recruited as volunteers to spread the message of the various petition-drive organizers." *Id.*

In *American Constitutional Law Foundation, Inc. v. Meyer*, 870 F.Supp. 995 (D.Colo. 1994), *aff'd and rev'd in part*, 120 F.3d 1092 (10th Cir. 1997), although the district court upheld Colorado's statutory voter registration requirement for initiative and referendum petition circulators, the court did note that "The record does show that the requirement of registration limits the number of persons available to circulate and sign these petitions and accordingly, restricts core political speech." *Id.* at 1002. On appeal, the Tenth Circuit struck down this voter registration requirement for petition circulators as "unconstitutionally imping[ing] on free expression. . . . " *American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d at 1100.

[75] *See* Colo. Const. art. V, §1(6).

[76] *See American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d 1092, 1100 (10th Cir. 1997).

was not narrowly tailored to satisfy a compelling state interest.[77] This decision is now before this Court for review.

iii. Mississippi

Article 15, §273(12) of Mississippi's Constitution states that the legislature "shall provide by law the manner in which initiative petitions shall be circulated, presented and certified." Subsection 13 continues by stating that while the legislature may enact laws so as to allow the people to exercise this initiative power, the legislature "shall in no way restrict or impair the provisions of this section or the powers herein reserved to the people."[78]

The legislature enacted legislation implementing the initiative process in 1993. However, along with the restriction that prohibited circulators from being paid "per signature," the legislature overrode the Governor's veto in 1996 and required circulators to be qualified electors of Mississippi.[79] This law was struck down.[80]

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[77] The court also noted that Colorado's voter registration requirement also had a discriminatory effect because it precluded persons who were not registered voters "from participating in core political speech." *American Constitutional Law Foundation, Inc.*, 120 F.3d at 1100.

[78] *See* Miss. Const. art. 15, §§273(12) and (13).

[79] *See* Miss. Code Ann. §23-15-11 (qualified elector); Miss. Code Ann. §23-17-17(2). An initiative petition circulator must be a resident of and registered to vote in Mississippi.

[80] *See Term Limits Leadership Council, Inc. v. Clark*, 984 F.Supp. 470, 471 (S.D.Miss. 1997). Plaintiffs submitted evidence to the court demonstrating that in three earlier petition drives, out-of-state circulators accounted for approximately 84% of all of the signatures collected, and that these same circulators who were generally professional circulators were able to collect the signatures with more efficiency than the circulators who were residents. Significantly, the Plaintiffs provided evidence that while there were 124 out-of-state circulators and 281 Mississippi circulators, the out-of-state circulators collected an average of 3,057 signatures while the Mississippi circulators collected an average of only 251 signatures. *Id.* at 472-73. Based on this evidence, the court determined

Despite this recent ruling striking down the requirement that petition circulators had to be "qualified electors," the legislature recently proposed an amendment to its Constitution that would require circulators to be "residents." This proposed amendment is to be placed on the ballot for the people to ratify in November, 1998.

Mississippi's legislature is fervently seeking to impose this restriction on the people's initiative right, despite the fact that its constitution specifically prohibits it from enacting legislation that restricts or impairs the people's power to the initiative.

D. Different voting schemes are used for legislation versus initiatives.

In addition to placing additional qualifications on persons seeking to use the initiative and referendum, several

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that the use of out-of-state circulators who were paid "per signature" was the " 'most effective' and 'economical' avenue of political communication for them." *Id.* at 473 (citing *Meyer v. Grant*, 486 U.S. 414, 424 (1988)).

The court determined that one alleged incident of fraud on the part of a non-resident paid circulator was not adequate to support the State's conclusion that non-resident petition circulators were more likely to commit fraud or "otherwise pose a threat to the integrity of the initiative process." *Id.* at 475. In addition, the court questioned the state's reasoning that individuals who were disinterested in whether or not an initiative made it on the ballot were any more likely to commit fraud or offer false information than individuals who were "zealously interested in the success of an initiative petition drive." *Id.* at 475. Finally, the court noted that the state failed to provide any evidence to support its claim that residents were more likely to know more than non-residents regarding the petition.

Compare this court's conclusions with North Dakota's statutory ban against paying initiative petition circulators on a per signature basis. This ban was enacted after one incident involving petition fraud during a lottery initiative. *See* N.D.C.C. §16.01-12(11) and California Commission on Campaign Financing, Democracy by Initiative – Shaping California's Fourth Branch of Government 143 (1992).

states have also imposed unique voting schemes on initiatives; thereby making it more difficult for the people to successfully enact their proposals.

In Mississippi, constitutional amendments proposed by the legislature become part of the constitution "if it shall appear that a majority of the qualified electors voting directly for or against the same shall have voted for the proposed change, alteration or amendment,. . . . "[81] However, for constitutional amendments proposed by the people through the initiative, the initiative or legislative alternative "must receive a majority of the votes thereon and not less than forty percent (40%) of the total votes cast at the election at which the measure was submitted to be approved."[82]

Wyoming allows passage of an initiative only when "an amount in excess of fifty percent (50%) of those voting in the general election" cast a vote in favor of the proposed measure, not just a majority of those voting on the proposed measure.[83] Thus, if voters choose not to vote on a measure, their non-vote is counted against it.

Massachusetts provides that legislative constitutional amendments, "if approved by a majority of the voters voting thereon," become part of the constitution. On the other hand, amendments proposed through the initiative or legislative substitutes become part of the constitution if approved "by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment."[84]

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[81] *See* Miss. Const. art. 15, §273(2).

[82] *See* Miss. Const. art. 15, §273(7); Miss. Code Ann. §23-17-29.

[83] *See* Wyo. Const. art. 3, §52(f); Wyo. St. Ann. §22-24-120.

[84] *See* Mass. Const. am. art. 48, Pt. 4, §5. *See also* Mass. Const. am. art. 48, Pt. 5, §1.

E. The Legislature naturally encroaches on legislative power.

Many, if not most, of the restrictions discussed above were enacted during the recent wave of term limit initiatives enacted by the citizenry. However, legislatures have always vigilantly inhibited the people's right to the initiative and referendum. Restrictions imposed on the people's use of these powers have typically been direct responses by the legislature to use of these powers.

In Washington, Article II of its constitution was amended allowing the legislature to amend any statute approved by the voters within two years of its enactment if a two-thirds vote in each house votes to amend.[85] California's "single-subject" requirement for initiatives resulted from a "pension bill of rights" initiative in 1948. The California Supreme Court struck it down, and an amendment was then adopted precluding the sponsoring of "multi-subject" initiatives.[86] Similarly, the Colorado legislature held a referendum regarding the "single-subject" requirement for initiatives in 1994. This move by the legislature was in response to a successful 1992 tax and spend limitation initiative and the likelihood that there would be more multiple issue initiatives on the ballot in 1994.[87]

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[85] This amendment appears to have been in response to two initiatives that were passed in 1948 which created a bonus for World War II veterans and increased public assistance benefits. Because of the burden these initiatives had on the state budget, Amendment 26 was approved. *See* Evens, *supra* note 21, at 252, 271.

[86] *See* MAGLEBY, *supra* note 5, at 45. California's Constitution also prohibits identifying a private corporation by name in a proposed constitutional amendment. This restriction resulted from a 1964 initiative that proposed a state lottery and named a specific corporation to run it. *Id.* at 46.

[87] *See* Richard B. Collins and Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 88 (1995). Other statutory restrictions that the Colorado legislature enacted but which were struck down include a 1971 statutory amendment that

These are just a few examples of how the legislatures have acted to limit the people's right to initiate laws and/or amendments. No instance exists where the citizens have initiated a law to limit their own independent legislative power. Instead, the legislature has determined that the people have abused their legislative power, and they must be stopped before they act again.

F. Similar restrictions are not imposed on lobbyists or other campaign workers.

Throughout this Brief, Amicus Curiae has noted that legislators enacted restrictions for the apparent purpose of "maintaining the integrity of the initiative process." Despite this asserted interest, however, the legislatures in the initiative states have failed to impose the same or similar restrictions on lobbyists hired to influence legislation and/or executive policy or individuals hired to work on a candidate's campaign for political office, including the circulation of a candidate's nominating petitions.

This disparate treatment can be seen in Mississippi's Lobbying Reform Act of 1994.[88] While the Act defines "lobbying" as including "(i) Influencing or attempting to influence legislative or executive action through oral or written communication; . . . ,"[89] the legislature has imposed **no restrictions** on who may come into the state seeking to

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would require circulators and signers of initiative petitions to be registered voters, *see Colorado Project-Common Cause v. Anderson*, 495 P.2d 220 (Colo. 1972); an increase in the minimum number of petition signatures to qualify a petition from eight (8%) percent to fifteen (15%) percent, *see Baker v. Bosworth*, 222 P.2d 416 (Colo. 1950); and a requirement that petitions for initiatives had to be filed with the appropriate state official eight (8) months before the election, *see Yenter v. Baker*, 248 P.2d 311 (Colo. 1952).

[88] *See* Miss. Code Ann. §§5-8-1 through 5-8-23.

[89] *See* Miss. Code Ann. §5-8-3(k). Mississippi requires lobbyists and lobbyists' clients to file registration statements, expenditure reports, and reports regarding payments to lobbyists by their clients with the Mississippi Secretary of State, *see* Miss. Code Ann. §5-8-5, §5-8-9, and §5-8-11.

Section 5-8-9(2)(a) provides that a lobbyist's client must submit reports of expenditures every January 30th which includes "A payment to a lobbyist for salary, fee, compensation for expenses, or other purpose by a person employing, retaining, or contracting for the services of the lobbyist separately or jointly with other persons."

influence the course of legislative and executive policymaking. Yet, it requires those utilizing the initiative to be both residents and registered voters.

Similarly, despite having residency and voter registration requirements for circulators of initiative and referendum petitions, Wyoming fails to impose similar restrictions on lobbyists.[90] Furthermore, while Wyoming requires petitions for candidates who are nominated by petition as independent candidates to include a circulator's verification,[91] no statements indicate that the nomination petitions must be circulated by "qualified registered voters."[92] Nor does Wyoming prohibit paying these circulators based on the number of signatures they collect.[93]

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[90] *See* Wyo. St. Ann. §28-7-101 to §28-7-104. Wyoming merely requires that persons who are being compensated as a lobbyist on behalf of an association, corporation, labor union, or any other non-personal interest, must register with the director of the legislative service agency before making any statements to members of the legislature or to standing committees. Such individuals are required to give their name, business address, and the name and business address of the entity on whose behalf he or she is appearing. The director of the legislative service agency must then distribute this registration information to all members of Wyoming's state legislature. *See* Wyo. St. Ann. §28-7-101.

[91] This requires the circulator to sign the petition he/she circulated and to write their residence address.

[92] *See* Wyo. St. Ann. §22-5-301.

[93] *See* Wyo. St. Ann. §22-5-301 through §22-5-308. Yet, in 1996, the legislature amended the provisions regarding initiative and referendum petitions, §22-24-110, in order to require that each page of a petition include the statement in bold, **red** type that the circulator is being paid, and the State must include a similar notice on all materials used to **describe the**

In Colorado, while circulators of petitions for candidacy and recall must be eligible electors in the political subdivision where they are circulating petitions and they must affiliated with the political party of the candidate for at least two (2) months prior to filing the petition,[94] no provisions exist regarding paying such circulators and having such payment information printed on nomination petitions as there exist for initiative petition circulators. Nor does it make provisions for such circulators to wear identification badges or to file monthly disclosure requirements for paid nominating petition circulators.[95] Similarly, Colorado imposes no residency or voter registration requirements for lobbyists nor does it require lobbyists to wear identification badges.[96]

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proposition. *See* Wyo. St. Ann. §22-24-110(e). Wyoming also legislatively prohibited the payment of circulators of initiative and referendum petitions from being paid per signature. *See* Wyo. St. Ann. §22-24-125(a). In 1993, the Wyoming state legislature added subsection (f) to Wyo. St. Ann. §22-25-107 which now requires an organization that supports a petition drive to file a statement with the Wyoming Secretary of State indicating the total amount spent to get signatures on the petition; the names and addresses of the individuals paid to get the signatures, the amount paid to each circulator who collected signatures, and the period in which the signatures were collected.

[94] *See* Colo. Rev. St. Ann. §1-4-901 through §1-4-912.

[95] Colorado does require that "registered professional lobbyists" and any firm that is organized for professional lobbying purposes to disclose "the gross income for lobbying since the prior month's disclosure statement and the name and address of any person from whom gross income for lobbying is received totaling one hundred dollars or more." *See* Colo. Rev. St. Ann. §24-6-302(2.5)(a). *See also* Colo. Rev. St. §24-6-303(1)(d).

[96] Under its "Sunshine Law," lobbyists must register with the Secretary of State, *see* Colo. Rev. St. Ann. §24-6-303, and file disclosure statements, *see* Colo. Rev. St. Ann. §24-6-302.

North Dakota also requires lobbyists to register with the Secretary of State and to get a "distinctive lobbyist identification badge." *See* N.D.C.C. §54-05.1-03(1). However, it does not require lobbyists to be residents or voters of the state. Nor does it impose any prohibitions on how lobbyists are paid or by whom the lobbyist is paid or will be paid.

Oddly, at the time the Colorado Legislature deemed it necessary to enact restrictions on those seeking to use the initiative process, it did not also impose the same limitations on lobbyists who are, like sponsors of initiatives, seeking to influence Colorado's elected officials.

Maine does not impose the same restrictions regarding residency and voter registration on lobbyists as it does on initiative and referendum petition circulators.[97] Nor does it impose the initiative restrictions on circulators of nominating petitions.[98]

Finally, Idaho also regulates lobbyists.[99] Lobbyists are not required to wear display tags at the time of lobbying. More importantly, while the legislature requires persons seeking to evoke change through the initiative and referendum to be residents and registered voters of the State,[100] persons seeking to accomplish the same thing via lobbying are not required to be residents or registered voters of Idaho.[101]

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[97] *See* 3 Me. Rev. St. Ann. §316. *See also* 21-A Me. Rev. St. Ann. §903-A; Me. Const. art. IV, Pt. 3, §20.

[98] *See* 21-A Me. Rev. St. Ann. §354(7)(A).

[99] *See* Idaho Code Ann. §67-6617. *See also* Idaho Code Ann. §67-6623.

[100] *See* Idaho Code Ann. §34-1807.

[101] As the court noted in *Bernbeck v. Moore*, "In no other case are Nebraskans who advocate or oppose electoral measures prohibited from hiring or recruiting people to help get their message out merely because a prospective worker or volunteer is not registered to vote." *Bernbeck v. Moore*, 936 F.Supp. at 1563.

Idaho, does, however, require the political treasurer of a candidate or political committee be a registered elector of the state. *See* Idaho Code Ann. §67-6603(a).

CONCLUSION

Legislators have limited the initiative rights of the separate and supreme branch of state government, the citizenry. No precedent supports the right of an inferior and separate branch of government to limit the means by which the lawmaking power of a superior branch is exercised. The citizens certainly have the means to limit their power through the initiative.

Legislative attacks on the initiative have not been focused on instances of fraud in the legislative process in general, but instead have limited the citizenry's right to govern. In addition, even if an initiative or referendum is allowed on the ballot by fraudulent means, the citizens themselves still must approve that measure. The citizens, therefore, serve as the final bulwark against state initiatives drafted by the people. Because the initiative states recognize the citizens as the supreme branch of state government, and because of the First Amendment rights of the citizens, the legislature does not have the right to change that process.

The judgment below should be affirmed.

Respectfully submitted,

STEPHEN J. SAFRANEK
651 E. Jefferson
Detroit, Michigan 48226
(313) 596-0268

Legal Counsel of Record
for Amicus Curiae
Initiative & Referendum Institute